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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,  
*Appellants,*

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE  
COMMISSION, ET AL., *Appellees.*

Appeal From the District Court of the United States for the  
Southern District of New York.

**BRIEF FOR THE AMERICAN WAREHOUSEMEN'S  
ASSOCIATION, MERCHANDISE DIVISION,  
AN APPELLEE.**

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Association, Merchandise Division.*

November, 1938.



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**OPINIONS BELOW.**

The opinion of the specially-constituted District Court  
(R. 302), The Baltimore & Ohio Railroad Company, et al.,  
Plaintiffs, v. The United States of America, Defendant, and  
Interstate Commerce Commission, et al., Intervening-

Defendants, is reported in 20 F. Supp. 273, and the concurring opinion of Judge Hulburt (R. 311) in 20 F. Supp. 917. The findings of fact and conclusions of law of the Court appear in the record, beginning at page 341, and page 402, respectively.

The first report of the Interstate Commerce Commission, December 12, 1933, entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storing of Property by Carriers at Port of New York, N. Y.* (R. 29-115) is published in 198 I. C. C. 134. The second report of the Commission, on further hearing, June 8, 1936 (R. 120-199) is published in 216 I. C. C. 291. The third report of the Commission, on argument and re-consideration, February 2, 1937 (R. 269-271) is published in 220 I. C. C. 102.

### **JURISDICTION.**

The decree of the District Court was entered March 23, 1938 (R. 406); petition for appeal was filed May 3, 1938, and was allowed on the same day (R. 411).

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C. Title 28, sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, sec. 345).

### **QUESTIONS PRESENTED.**

Whether the findings of the Interstate Commerce Commission, taken at their full and face value, are sufficient in law to support the order of February 2, 1937 (R. 272-274).

Whether the services of storage, handling and insurance, found by the Interstate Commerce Commission to be commercial services with respect to goods voluntarily warehoused by appellants in facilities enjoying storage-in-transit privileges, are transportation services, since tariffs covering such voluntary services are permitted or required to be published and filed with the Commission.

## STATUTES INVOLVED.

Pertinent provisions of the Interstate Commerce Act, as amended, and the Elkins Act, are printed in the Appendix, *infra*, pages 62-68, incl.

## STATEMENT.

This is an appeal from a final decree (R. 406) of the specially-constituted District Court dismissing appellants' bill to enjoin and set aside the Commission's order of February 2, 1937 (R. 272-274) insofar as the order requires that the respondent carriers\*, appellants here, cease and desist:

(a) From permitting shippers in interstate commerce over said carriers' lines to occupy space by lease or otherwise in the warehouses and other storage facilities owned or controlled by the carriers, at rates and charges below the cost of providing the space;

(b) From storing goods shipped over their lines in interstate commerce, or providing space to shippers in interstate commerce over their lines for commercial storage of goods, as fully described and defined in said reports, at rates and charges which fail to compensate these carriers for the cost of storing such goods or providing such storage space;

(c) From directly or indirectly handling goods incident to such commercial storage as defined and described in said reports, at their warehouses and storage facilities, for shippers in interstate commerce, at rates and charges which fail to compensate them for the cost of such handling;

- \* The Baltimore & Ohio Railroad Company
- The Central Railroad Company of New Jersey
- The Delaware, Lackawanna & Western Railroad Company
- Erie Railroad Company
- Lehigh Valley Railroad Company
- The New York Central Railroad Company
- The Pennsylvania Railroad Company

(d) From insuring goods shipped over their lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers in the Port of New York district for shippers in interstate commerce at less than the cost of providing such insurance. (This requirement of the order is directed against all the respondent carriers except The Central Railroad Company of New Jersey which as the Commission found, does not engage in such insurance);

(e) From applying, by means of tariffs now on file with the Commission, rates and charges which fail to compensate the carriers, fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce, which goods are stored, handled or insured in connection with commercial warehousing services as fully defined and described in said reports. (R. 342, 343)

The order further required that appellant, the Central Railroad Company of New Jersey, shall cease and desist from subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals for space leased from said appellant by the Newark Central Warehouse Company. (R. 343.)

As issued, the order also required appellant Erie Railroad Company to cease and desist from subsidizing and granting concessions to the Seaboard Terminal & Refrigeration Company by means of excessive rentals paid for space leased from that company. Upon complaint of the latter that it had not been granted a hearing, the Commission, by order dated April 9, 1937, rescinded this part of the order and reopened this part of the case for further hearing. Therefore the question of the validity of this part of the order is not before the Court. (R. 343)

The appellants, named in the above footnote, are trunk line railroads serving the Port of New York District. The American Warehousemen's Association, Merchandise Di-

vision, is an appellee; it respectfully presents this brief and submits that the decree below should be affirmed.

The American Warehousemen's Association, Merchandise Division, is an unincorporated national association, composed of about (400) four hundred merchandise warehousemen (many of whom each own or operate several variously located warehouses). This national association has, for over 47 years, functioned as the national business or trade organization for the said public warehousing industry. Organized to promote the industry's welfare, it has participated in and adduced evidence before the Commission in the hearings in this case. Association members own or operate over ten million square feet of public merchandise warehousing space in the Port of New York District.

Many association members have been seriously affected by the conduct of appellants subjecting these members (through violations of the statutes as found by the Commission) to unjust discriminations and undue prejudices, and to the most ruinous of below-cost, wasteful competition in their (appellants') purchase of traffic activities. These traffic-grabbing vices, in the competition between appellants, include the wild grabbing, one from the other, regardless of the "market" or the "cost," of the commercial warehousing accounts of certain (larger) shippers. These large shipper accounts—heavy traffic—are obtained by appellants even if thereby depletion of line-haul tariff charges results. (R. 105-107; 111-113; 196-198; 348-350, 355, 356; 367, 368-369; 382.)

### **Proceedings Before the Commission.**

The order made by the Commission was the result of an investigation upon the Commission's own motion regarding the practices of rail carriers which affect operating revenues or expenses. It was purposed to correct unlawful discriminations, prejudices, and other violations of law found by the Commission. This investigation was known as Ex

Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses; for the convenience of the Commission this investigation was divided into several parts. Part VI of this proceeding was instituted by the Commission January 6, 1932, on its own motion, and concerned the practices of railroads in warehousing and storing property in the Port of New York district. These practices were initially brought to the Commission's attention by complaints of warehouse operators in the New York district.

These warehouse operators complained that carrier-owned or controlled warehousing facilities were being operated in a manner which precluded the complaining warehouses from obtaining much, if any, of the business; thereby they were losing much of their business to carrier-controlled facilities and that they could not longer meet the competition of such warehouses. (R. 31, 344, 349-50)

Each of the appellants herein was named as a party-respondent in said proceeding. Pursuant to notice given, there was a hearing in said proceeding, held at New York, N. Y., during the period June 27 to July 13, 1932, at which evidence was presented by counsel for the Commission, and by counsel for the complaining warehousemen. In order that the respondents might have ample time to prepare their defense, thereupon the proceeding was adjourned and pursuant to notice given, the hearing was resumed at Washington, D. C., about six weeks later, August 22, 1932, at which time the respondents presented evidence. At these hearings voluminous evidence was taken; the transcript of the testimony covered approximately 2,343 typewritten pages, and 234 documentary exhibits were received. (R. 344)

A proposed report was issued by the Commission's Examiners March 13, 1933, served upon the parties, and to this proposed report exceptions were filed by the respondents and by certain other parties. Oral argument before the Commission was waived. The Commission issued its first report in said proceeding on December 12, 1933, (*supra*)

containing its findings of fact, conclusions and decision, wherein it admonished all carriers, subject to the Interstate Commerce Act, including appellants herein, "that their practices and charges should be adjusted in conformity with the principles announced in this report." (R. 113) The Commission made no order at that time. (R. 345)

The carriers (appellants) failed to correct the violations of the law as pointed out in the findings made in said first report, and the Commission on May 6, 1935, ordered the proceedings re-opened for further hearing. After notice further hearings were held in said proceeding at New York during the period from June 24th to July 6th, 1935, and 1,629 additional pages of testimony were taken, together with 68 additional documentary exhibits. Thereafter further briefs were filed in said proceeding, but oral argument was again waived. The Commission issued its second report on further hearing in said proceeding on June 8, 1936 (*supra*), containing its findings of fact, conclusions and decisions based upon the enlarged record then before it. With said report the Commission issued an order of the same date, but subsequently suspended this order from time to time, and it was superseded by the Commission's order of February 2, 1937. (R. 345)

After the issuance of this second report, and the order of June 8, 1936, the carriers petitioned the Commission to grant them a third hearing, which petitions were denied. However, the Commission re-opened the proceeding for oral argument and re-consideration. Oral argument was held before the Commission on November 23, 1936. Thereafter, on February 2, 1937, the Commission issued its third report on argument and re-consideration (*supra*) and with this report made the aforesaid order of February 2, 1937. (R. 345)

### The Commission's Findings.

The Commission (and the Court below) made full and complete findings concerning which no single finding was set forth, alone, as basic or as the ground for its conclusions or order. It first pointed out that the commercial warehouse business has been an important factor in the conduct of this country's commerce for more than a hundred years, and that it has been necessary, always, for tradesmen dealing in quantities of merchandise either to provide and operate their own warehouse facilities, or to use those provided by public warehousemen for the storage and distribution of their goods. (R. 34, 346) The principal business solicited and performed by public warehousemen is the handling, storing, (for long or short terms) and the distribution of freight (including all incidental services), in carload or small quantities, regardless of the form of transportation used in shipment or reshipment. This commercial warehousing business includes as one of its functions the assembling and distribution of carload lots, permitting tradesmen to take advantage of lower rates in carloads than in less-than-carload lots. (R. 34, 346, 347) Commercial warehousing includes performance of storage, handling, and related services at public warehouse facilities where storage-in-transit privileges are enjoyed. (R. 356)

Respecting this commercial warehousing business, regarding assembling and distributing carload lots, the Commission found that the carriers, appellants, were parties to and were bound by the provisions of the Consolidated Freight Classification, by the various rules of which the trunk lines provide that they will neither load, unload, assemble, or distribute carloads of goods which they transport at carload rates. (R. 34, 347) By Rule 27 of the Consolidated Freight Classification, carload freight, transported at carload rates, must be loaded and unloaded by the owner or consignee (*Ibid*). These rules in connection with the provisions of the Uniform Bill of Lading the Demurrage Tariff and the Jones Storage Tariff,

provide for simple and orderly terminal service on shipments of freight for which the storage service afforded is short, and for which such storage service is a necessary step in the tendering of out-bound shipments for transportation, and the delivery of inbound shipments (*Ibid*).\*

The distinction between transportation storage, or storage in connection with transportation service which the carriers are obligated to furnish, and public warehousing or commercial storage and warehousing is distinctly drawn by the Commission in both its first and second reports: "While storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal." (R. 103) The Commission found clearly a distinction between voluntary or commercial storage ordinarily performed by a warehouse, and the involuntary storage which carriers subject to the act are obligated to perform. The storage of commodities for the convenience of shippers while markets are being sought is not properly a carrier's function. (R. 188, 189, 348, 368).

The Commission found that the complaining private warehousemen who claim that a large part of the value of their warehouse properties has been confiscated and destroyed by the practices of the carriers (appellants) in en-

\*The bill of lading demurrage provisions concern carlot shipments into and out of New York where the shipper does not promptly load or unload the cars placed for loading or unloading. A certain time, without additional charge for the car use, is allowed and included in the tariff rate. Thereafter a penalty, or demurrage charges, accrue. The Jones tariff provisions concern involuntary storage (penalty charges) on shipments tendered for transportation but necessarily stored on the carrier's premises because of delay re transportation instructions; or, relate to shipments received in New York (inbound) concerning which the consignee does not take delivery within the free time allowed in the transportation tariff.

gaging in what the warehousemen (appellees here) consider trade activities and not common-carrier service, introduced testimony and exhibits in the Commission proceedings, none of which was refuted by the carriers, which show that these commercial warehousemen have lost business in practically every form of warehousing to the appellants' affiliated and storage companies. In addition to furnishing warehousing services the Commission found that the appellants, or their subsidiaries, also rent space in stations, piers or warehouse buildings to certain shippers for various purposes, and the rental exacted, "is not only below the prevailing rates but is non-compensatory." (R. 97, 98, 107, 126, 349, 350) "Obviously no independent warehouse could continue to sub-lease space or store goods at charges below cost." (R. 138) The warehousing, storage, handling, etc., rates offered by appellants are below those of private warehousemen. (R. 105, 107) The Commission recognized no obligation of the rail carriers to place their charges for commercial warehousing on any basis to insure profit to private commercial warehousemen, but only the obligation that the carriers' charges meet the provisions of the statutes. (R. 110)

Private or commercial warehousing companies are "persons" within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act, and the transportation charges which these "persons" are required to pay and the treatment they are accorded by the carriers subject to the Act, are subject to the provisions of these sections as well as to the provisions of the Elkins Act. As shippers these private warehouse companies are to be dealt with in accordance with the provisions of the Act. (R. 109, 110, 127) These warehousemen (appellees), both merchandise and cold storage, are engaged in the storage and warehousing of goods shipped in interstate commerce to and from all sections of the United States over appellants' lines, and their business is dependent for existence upon the appellants' transportation services—coupled with reasonable and non-discriminatory rates and practices. (R. 97, 346)

It is well understood that the controlling fact in the mind of a warehouse patron is the aggregate cost of the transportation and warehouse services, and the assumption of any part of the warehouse charges by the carrier enables the warehouse performing the service to offer rates which private warehousemen, appellees, cannot meet. (R. 97, 348)

The *motive of the appellants* in engaging in the commercial warehousing business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines. The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. The aggregate of the charges for transportation and warehousing, or storage, influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services. Those engaged solely in the warehousing business must depend entirely upon that business for revenue and profit. The rail carriers directly, or through dominated and controlled subsidiaries, seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen. (R. 105, 124, 125, 348, 349)

It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation. The Commission pointed out that in the variety of arrangements of the carriers, appellants here, the result was always the same, namely, possession and control of warehouse facilities available to serve whatever competitive purposes railroad management may have in mind. (R. 124, 125, 348, 349) In seeking out the larger shippers and offering them non-compensatory rates and charges for warehousing services or space furnished, (rates below those of private warehousemen (R. 105)) the Commission found that the record showed the conflict was not confined to rail carriers and private warehousemen, but that the struggle between different rail carriers for supremacy in the matter of in-

documents was clearly evident, without due regard for expenditures and profitableness of the business. (R. 106)

Furthermore, the conflict of interest applies also as between larger shippers controlling sufficient traffic to enable them to use the carrier-controlled warehousing facilities at non-compensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities at higher rates than are charged by the carrier-controlled warehouses. (R. 106, 183, 349)

With reference to these practices and charges, the performance of commercial warehousing services, at non-compensatory rates, the Commission found that these practices and charges result in heavy losses not only to the appellants here, but also to the competitive commercial warehouse companies. (R. 125)

The Commission found that while up to the close of the year 1930, the cold-storage industry had placed approximately 33,689,000 cubic feet of refrigerated space on the market in the New York district, that within three years thereafter, warehouses affiliated with the Erie and Pennsylvania Railroads placed an additional 8,500,000 cubic feet of refrigerated space on the market, an increase of about 25 per cent over the amount of such space put on the market by all public warehouses in that district during the preceding period of fifty years, or more. It found also that at the time these new facilities were opened for operation there was an unused occupancy of at least 30 per cent of the then existing facilities, and that at the time of the further hearing (June, 1935) there was less than 50 per cent occupancy. (R. 125, 350)

At the time of the second hearing (June, 1935) at least 43 private warehouse companies engaged in merchandise warehousing (other than cold storage) in the Port of New York district had placed 20,450,000 square feet of warehouse space on that market, during a period of seventy years up to that time, and that within six years after Janu-

ary 1, 1929, the appellants or their affiliates added 6,185,000 square feet of new merchandise warehouse space on this market, and that thereby *without commercial need* appellants increased the available capacity at least 25 per cent. (R. 125, 126, 350). The Commission specifically pointed out and found that: "The record indicates that because of insufficient prospective earnings, it would not have been possible to have raised capital with which to have constructed the new warehouses without the use of railroad credit and funds." (R. 126).

Following these findings applicable, generally, to all appellants, the Commission separated its findings and analyses, and:

(a) Discussed the properties used or leased for warehousing purposes by each individual appellant;

(b) Considered the storage of eastbound carload freight at New York;

(c) Dealt with storage in transit arrangements and the warehousing of westbound carload freight at New York;

(d) Made findings concerning the insurance practices of appellants, and

(e) Summarized the general westbound storage situation and made principal findings of fact with respect to the so-called "transit storage," and services incidental thereto. (a, R. 128-175; b, R. 176-179; c, R. 179-192; d, R. 192-196; e, R. 179-192; 196-198.)

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Regarding (a), the facilities used or leased for commercial warehousing purposes by each individual appellant, the Commission found:

1. The Baltimore & Ohio owns a warehouse building in New York City at 26th Street and 11th Avenue, constructed in 1913, in which space is leased to its subsidiary, the

Baltimore & Ohio Stores, Inc., which conducts a general warehouse business of the same nature as, and in competition with private merchandise warehousemen in the Port of New York district. (R. 128, 352) Most of the commodities stored in this warehouse are shipped over the Baltimore & Ohio in interstate commerce; in some instance the storage company pays the freight charges on shipments consigned in its care and arriving collect, later collecting them from the consignee. In other cases, money advances are made to shippers for payment of charges for trucking or similar incidental services for which a commission is charged. Labeling, sorting and marking of commodities are performed at a charge; some pool cars are handled. The practices at this warehouse did not differ materially from the practices of warehouse operators in general in the Port of New York district for a number of years after the incorporation of the predecessor of the Stores Company in 1914. As then conducted it apparently resulted in some profit. However, upon the entrance of other appellants into the commercial warehousing field in the district, on a much larger scale than those of the Stores Company, competition for commercial warehousing business became increasingly bitter. (R. 129)

After that time the Traffic Department of the B. & O. dominated the management of the Stores Company. (R. 129) The desire of the Traffic Department to secure business for the Baltimore & Ohio resulted in forcing the warehouse rates and charges to unprofitable levels, leaving the Baltimore & Ohio to assume the burden of the warehousing operation. (R. 130, 134) The Baltimore & Ohio's Traffic Department dictated many rates which, when applied by the Stores Company, resulted in the rental of space and storage of goods at prices which, while they obtained the line-haul business for the Baltimore & Ohio, were less than the cost of providing the space or services. The shipper, in those instances, obtained a concession in storage which affected and reduced the total cost for transportation and storage of the commodities shipped.

(R. 134, 135). The Commission found that by bearing the losses of the Stores company the concession was provided, resulting in unjust discrimination and violation of section 2, and undue and unreasonable preference and advantage in violation of section 3, of the Interstate Commerce Act, and that the carrier departed from its published transportation tariff rates, in violation of section 6 of the Act. (R. 135, 136)

Prior to July 10, 1930, the B. & O. used space on its piers 5 and 6, St. George, Staten Island, and a portion of Municipal Pier 12, Stapleton, Staten Island, rented from the city, for such storage. On that date the B. & O. leased and thereafter used space in the American Dock Stores at Tompkinsville, Staten Island, at a rate of \$.55 per square foot per annum for this storage—this to enable the B. & O. to maintain its position among the other lines and to “obtain satisfactory results from a solicitation and traffic producing standpoint.” On August 5, 1930, the B. & O. leased space in Pouch Terminals, Inc., at Clifton, Staten Island, for a similar purpose and at the same rental; both leases are flexible so far as space is concerned. In this space were stored goods (west-bound) under the “transit privilege.” (R. 42, 47, 48, 49, 50, 128, 355). The in-transit arrangements and storage of westbound carload freight are later discussed—((c) and (e)).

2. The Lackawanna leases an indefinite amount of space in the upper floors of its warehouse building in Jersey City, an eight-story warehouse building containing over a million square feet of floor space, built by this carrier on its tracks near the water-front in Jersey City, completed in April, 1930, to its wholly owned and controlled subsidiary. The space leased varies with the needs of the subsidiary company. Its subsidiary, the Lackawanna Terminal Warehouses, Inc., conducts a commercial warehousing business in this space similar to that conducted by private warehousemen in the Port of New York district, and in competition with them. (R. 70, 71, 136, 351) The Traffic Depart-

ment of the Lackawanna has at all times dominated the warehousing arrangements of that appellant. The Commission pointed out the willingness of the various appellants to grant concessions in leasing of space to shippers in interstate commerce who control a large volume of traffic—that it is well illustrated by the leasing of space by the Lackawanna through its affiliated warehouse company to the Kraft-Phenix Cheese Corporation. (R. 140) The principal findings of fact by the Commission respecting this carrier are set forth at pages 144, 145 and 146 of the record, among which the Commission found that the non-compensatory rates and charges, and the other practices described re the Lackawanna in relation to this commercial storage of freight, reduce below the published tariff rates the transportation charges paid by said shippers, and grants other unlawful concessions to said shippers. The Commission further found that by assuming a part of such costs, by granting such concessions, the Lackawanna is guilty of unjust discrimination in violation of section 2 of the Act, makes and gives undue and unreasonable preferences and advantages in violation of section 3 of said Act, and departs from its published tariff rates in violation of section 6 of said Act. (R. 146) The warehousing of westbound freight by this carrier, under the storage-in-transit privilege is hereinafter discussed under (c) and (e).

3. The Lehigh Valley does not itself operate a warehouse business at its facilities. In 1929 it constructed its Lehigh Bronx Terminal Warehouse, a 12-story building on the Harlem River, New York City, containing 370,000 square feet, and in 1930, the Lehigh Valley Railroad completed its Sterrett-Lehigh building on 27th Street, 11th to 13th Avenues, New York City, containing 1,813,000 square feet. This appellant rents space in its facilities to various tenants. The Commission found the evidence to show that this appellant directs its efforts to leasing space to tenants who will produce freight traffic to its lines; that numerous prospective

tenants were refused space because their business would not produce rail traffic warranting such allocation (R. 58); that the Vice President of the Lehigh Valley had informed its General Land and Tax Agent, re leasing space, that for the time being he did not desire any leases in the Bronx warehouse property from a purely real estate viewpoint (R. 58, 149). Many other pertinent findings concerning these properties being leased below cost are included in the record including failure to collect rentals from persons who used the Lehigh Valley in transporting their shipments—that this failure results in the same situation as the failure to exact compensatory rentals. (R. 152) A summary of the principal findings of fact is found at pages 153 and 154 of the record; they are similar to those of the other carriers mentioned hereinbefore. West-bound storage, under in-transit arrangements, is later discussed.

4. The Central Railroad of New Jersey owns a six story steel and concrete warehouse located at Lawrence and Mechanic Streets in Newark, New Jersey. Until June, 1954, this warehouse, constructed in 1906, was operated by a subsidiary of the railroad; at that time the building was leased to the Newark Central Warehouse Company and in it that company now engages in general merchandise warehousing business in competition with other merchandise warehousemen in the Port of New York district. (R. 52, 53, 154, 155, 352) Traffic solicitation and advertising for the warehouse company emanate from the Freight Traffic Department of the Jersey Central in connection with the railroad's traffic information. (R. 155) Under the lease arrangement to the Newark Central Warehouse Company, the amount of rental paid by said company during its first year of occupancy was \$17,217, or slightly less than one-half of the taxes on the building for that period (R. 157) During that time, also, there was expended upon the building through the Jersey Central subsidiary company, \$38,560 in repairs, and depreciation on the building amounted to approximately \$21,500. (R. 157) The Commission found that the subsidi-

ary Newark Warehouse Company was responsive to the direction and control of the Central Railroad of New Jersey, a part of that carrier, and that it necessarily followed that that appellant provides warehousing facilities for the Newark Central Warehouse Company at rentals which are wholly non-compensatory. (R. 157, 159) Through the leasing "arrangement" a subsidy is given for commercial warehouse services, and unlawful "concessions" result, due to the traffic considerations involved. (R. 158) These findings were followed by findings of unjust discrimination, undue preference and advantage, sections 2 and 3 violations of the Interstate Commerce Act, and a departure from the published tariff rates in violation of section 6 of the Act. (R. 160) There is later discussed the west-bound so-called "in-transit" storage of this appellant.

5. With reference to the Erie Railroad, the Commission found that one of the earliest and most active carriers in the development of the present warehousing situation in the Port of New York district was this appellant. Sponsored by the Erie, or under contract by the Erie, the warehouse of the Seaboard Terminal and Refrigeration Company was constructed containing 800,000 square feet of space of which, under agreement, the first four floors, or 320,000 square feet, which are not refrigerated, are leased by the Erie from the Seaboard Company. (R. 88, 162, 163, 350, 351) In this (and other) warehousing space, the rental for which is 85c per square foot per annum, the so-called "in-transit" storage of west-bound freight is effected. The matter of the relation of the Seaboard Company and the Erie Railroad respecting space rentals by the Erie from the Seaboard is not included in this proceeding. (R. 343, paragraph #5) As in the case of the other appellants the so-called "in-transit" west-bound commercial storage activities of the appellant are hereinafter discussed.

6. The New York Central, in 1930, constructed its Kingsbridge Warehouse at 230th Street and Kingsbridge Avenue,

in the Bronx, in New York City, a six-story building, containing 300,000 square feet of space; and in 1934, this appellant constructed its St. John's Park Terminal Building in lower Manhattan on Spring Street, between King and Charlton Streets, a three-story building containing 600,000 square feet. The Auto Storage Company leases the space of the Kingsbridge Warehouse, except one-half of the first floor, which is used as a local freight station. This Auto Storage Company receives automobiles in carload lots; these are stored and later delivered in single units, or delivered direct without storage. The Carrier's arrangements with the Auto Storage Company provide for certain services including the unloading, delivery and certain free storage services. (R. 78, 79, 167, 168) The J. A. Mellish Warehouse Company, Incorporated, is closely affiliated with the Auto Storage Company. (R. 81) The New York Central leased the Mellish Company a warehouse building known as the Old Sheep House, and the first and second floors of a building known as the Rossiter Stores at an annual rental of 6.25 cents per square foot per annum, which is from 1/8 to 1/10 of the usual rate of paying for warehouse space in New York City. (R. 81, 167). The Mellish Company lease was revised January 1, 1935; however, the Commission found that under such leasing arrangement it is apparent that the rental paid is indefinite and affords opportunity for the collection of non-compensatory rentals such as have been condemned in other cases. It found the arrangements constituted a device to purchase traffic. (R. 168) The New York Central arrangements with the Auto Storage and Mellish Companies, whereby those companies perform services re unloading of automobiles, have been continued—in the amount of \$1.50 per automobile, or about \$5.25 per freight car. The Commission pointed out that certain of the appellants load and unload carload traffic, or make allowances to cover the cost of such loading and unloading for certain shippers, under exceptions to the classification, contrary to the general practice re carload traffic and to the

**Consolidated Freight Classification provisions. (R. 168)** It stated that an illustration of this character is the allowance made by the New York Central to the Auto Storage and Mellish Companies for unloading automobiles, including removal of materials used in stowing the automobiles in the cars. The Commission noted that this record is conclusive that the space rentals furnished by this appellant to the Auto Storage and Mellish Companies are at less than cost of providing such space, and that it is likewise conclusive that the services for which the allowances are made, are commercial, not common carrier services. A summary of these principal findings of fact by the Commission re the New York Central are found on pages 169 and 170 of the record. (R. 168, 169, 351, 352) The west-bound so-called "in-transit storage" of freight by this appellant is herein-after described.

7. The Pennsylvania Railroad completed it's Harborside Warehouse, located in the water-front in Jersey City, early in 1930; this structure contained 2,100,000 square feet of space, of which 1,750,000 square feet, are devoted to general merchandise warehousing, and 350,000 square feet are refrigerated or cold storage space; all three units are operated by the Harborside Warehouse, an owned and controlled subsidiary of the Pennsylvania Railroad Company. The Commission found that while it does not appear that this respondent has indulged in price-cutting on storage or space rented to the same extent as the other appellants here, it is clear that under some circumstances it engages in practices such as alterations made in space rented to fit the needs of some particular shipper, such as free rental for a period of time at the beginning of the lease, or such as the non-collection of storage charges when due, which offer opportunities to defeat the requirements of the Interstate Commerce Act. The Commission found a variance in the extent of the services performed by the Pennsylvania for its shipper-tenants, and as a result the compensation received by that appellant for a given service likewise varies;

such arrangements are contrary to the principles of the Act. The Commission's summary of these findings of fact concerning this appellant appears on page 175 of the record. (R. 174 and 175) The other findings concerning this appellant, relating to so-called "in-transit storage" arrangements of west-bound goods, and other practices, are hereinafter related.

In addition to the warehousing activities above noted under (a) each of the seven appellants directly and in its own name, in the capacity of commercial warehousemen, in competition with and solicitation against the private commercial warehousemen in the Port of New York district, is voluntarily engaged in the warehousing, storage and handling of goods, stored under the storage-in-transit privilege. (R. 47-50, 52, 53, 56, 63, 70, 75, 76, 77, 93; 179-192; 352) These goods generally are for west-bound rail shipment, discussed herein under (c) and (e) (*infra*, pp. 22, 30).

Regarding (b), the storage of east-bound carload freight at New York the Commission found, in its first report, (R. 36-39), that no extra charge is made by the carriers for handling goods in-and-out of storage, such as is described hereinafter in connection with west-bound freight. (R. 37) Storage of flour is a commercial necessity, and this commodity is desirable traffic from the appellants' standpoint. (R. 176) Dealers and persons interested in this commodity have been and are able to secure concessions for storage, which reduce and in some cases nullify their cost for the storage necessary, and appellants have willingly or unwillingly assumed the burden of the storage expense. (*ibid*)

This had been brought about through leasing of space in the railroad-owned or controlled warehouses, which permits lessees who are dealers in flour, or are otherwise interested in its distribution, to avoid payment of appellants' published charges for storage in their premises. (R. 51, 52, 176) Leases for space for storage of east-bound carload freight

at New York provide low monthly rentals on a square foot basis. In many instances the lessees are parties having no interest in the commodity itself, but only in the trucking, lightering, storing or stevedoring thereof. The record is conclusive that through existing arrangements the appellants have provided flour storage space at less than cost. (R. 176, 177) It is possible, as testified to at the first hearing, for flour merchants in New York City to avoid bearing any expense for such storage. (R. 177) Among other detailed findings of the Commission (R. 176-179), it stated that the leasing of space to shippers for storage of the particular description of traffic herein involved results in such shippers paying a lower storage rate than that charged other shippers for a space identical in all respects, and constitutes a device whereby respondents engage in unjustly discriminatory and unduly preferential practices forbidden by sections 2 and 3 of the Act. (R. 179)

The Commission pointed out that the leased space so discussed is leased from appellants and used for storage which is a necessity and which is a component part of the commercial activities in connection with the handling and distribution of flour; this storage is not a part of transportation as defined in the Act. (R. 179) The Commission further found that appellants by paying for or assuming the cost of such commercial service depart from their published transportation rates and charges in violation of section 6 of the Act. (R. 179, 369, 370, 371, 372, 373)

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Regarding (c), the storage in transit arrangement and the commercial storage of west-bound carload freight at New York, the findings of the Commission were comprehensive and detailed:

*Large tonnages of various commodities are warehoused and stored by appellants under the west-bound storage-in-transit privileges. (R. 182-187, 354) In 1933, for example,*

the aggregate tonnage stored by appellants were 152,746 tons of rubber, 33,570 tons of wood pulp, 37,635 tons of coffee, cyanide, sugar, ivory nuts, tin, senna, pepper, tapioca, flour, soap, ground peat, cocoa beans, hemp, paraffin wax, paint, bran and burlap, and 28,279 tons of various other commodities, or a total of one-quarter of a million tons, over 504 million pounds. (R. 180, 181, 354).

The storage in-transit privilege and rules and regulations governing the same are published in separate tariffs of appellants, filed with the Commission. These tariffs permit removal of goods stored under the in-transit privilege, at any time in any quantity, and by trucks (with certain charges) or other means. If held in storage beyond time limits of the transit privilege specified in tariffs, the same rates for storage apply. (R. 38) Both storage and handling charges are involved regarding this heavy west-bound traffic, and the Commission noted that the rates for storage and handling of west-bound freight are substantially lower than the rates for storage of east-bound freight. Some of the west-bound freight is stored on railroad piers which are also used for the storage and handling of east-bound freight. The Commission pointed out that the reason for the different storage rates has not been explained by appellants and that the difference cannot be justified by difference in service or service costs. (R. 39)

Under the storage in transit privilege if a shipment is re-forwarded from a transit point within the transit period, the rate in effect on the date of the shipment from the point of origin in the New York Harbor to final destination will apply, with certain exceptions. (R. 38, 105, 181, 353) "For example, crude rubber in car lots, moved by the B. & O. from ship-side in New York harbor to a warehouse in the port district for storage, is charged an in-bound local rate of 14 cents for 100 lbs. If subsequently reshipped over the B. & O. to Akron, Ohio (a typical destination) a rate of 40 cents per 100 lbs. is collected, and, since that rate is ap-

applicable from the shipside as well as from the warehouse, the local in-bound rate of 14 cents is refunded, resulting in the application of a net through rate of 40 cents. If the out-bound shipment is made after the expiration of the designated time limit, or is forwarded over the line of a carrier other than the in-bound rail carrier, the in-bound and out-bound movements are treated as local shipments and the separate rates to and from the warehouse are applied, resulting, in the case of the crude rubber to Akron, Ohio, in rates of 14 cents to the warehouse and 40 cents from the warehouse, or a total of 54 cents." (R. 353, 38)

These tariff provisions relating to the storage in transit privilege govern the application of the carriers' transportation rates; *they have no relation to the rates and charges for the warehousing or storage service which, as conducted by appellants in the Port of New York district is commercial and not transportation storage.* The Commission pointed out that this (so-called "in-transit storage") "partakes of the nature of commercial storage, and the storage involved is not, properly speaking, in-transit storage. The fact that it is designated as such in the carriers' tariffs does not invest it with the characteristics of in-transit storage." (R. 105) (Emphasis supplied.) In its second report the Commission confirmed its previous findings and stated further "that, to the extent that the respondents [appellants] engage in the storage of those commodities under the practices heretofore discussed, those respondents [appellants] have departed from the business of transportation and entered the business of commercial warehousing." (R. 191, 353, 354)

Concerning the voluntary warehousing of west-bound freight, stored in appellants' facilities enjoying storage-in-transit privileges, certain of the particular findings for each appellant showed?

1. The Lehigh Valley Railroad uses space in its Claremont terminal for this commercial and so-called in-transit storage. On July 1, 1935, it had in storage there, under its

west-bound storage in transit privileges more than 6,000 tons of crude rubber, cocoa beans and various other commodities. (R. 146, 354) The Commission found that on crude rubber remaining in store on the Lehigh Valley Railroad property for a period of twenty months, in accordance with an exhibit of record, the handling cost, and the storage cost, which does not take into account any depreciation on the building, *exceeded the entire amount of revenue which the Lehigh Valley receives as its divisions for transporting crude rubber from ship-side to the end of its line at Buffalo, New York.* (R. 146, 361) The Lehigh Valley pays 43.3 cents per net ton for handling west-bound freight; the published handling charge is 20 cents per ton on this west-bound freight. (R. 61)

2. The Lackawanna's subsidiary warehouse company performs all handling of goods stored by it and in its name at its Jersey City warehouse, including loading and unloading of cars, trucking to and from various locations in the warehouse, piling, transferring and loading into trucks and reloading. (R. 73, 358) After June 1, 1931, by contract the carrier pays 58 cents per ton for each handling. Two are necessary. It costs the carrier \$1.16 per ton to place the goods in storage and to reload them into a car. The shipper, under the so-called "in-transit" tariff, is charged 20 cents per ton for handling, thereby netting the Lackawanna a loss of 96 cents per ton. (R. 73, 359) At this carrier's Hoboken and Jersey City piers its handling of west-bound freight so stored under the in-transit privilege costs 35.9 cents per ton at the covered piers, and at other piers 12.7 cents per ton. Here again, at the covered piers, a loss of 15.9 cents per ton is absorbed. (R. 76, 359) In addition, the Commission found that this carrier, acting through its subsidiary, warehouse company, "performs services indirectly which it may not perform directly, and thus departs from the provisions of its tariff." (R. 144)

3. The Erie performs such storage (west-bound) under the in-transit privilege in space (the first four floors) leased

by it in the building of the Seaboard Terminal and Refrigeration Company in Jersey City, and in the warehouse of the Long Dock Company, a wholly-owned subsidiary, located on the water-front in Jersey City; also on its Weehawken and Jersey City piers 8 and 9. (R. 91-96, 161, 162, 354) As of March 1, 1935, this appellant had in storage in its leased Seaboard space approximately 17 million pounds of crude rubber; and in its Long Dock space 10 million pounds of the same commodity. (R. 161, 163, 354) In Commission's first report is shown a loss on similar freight in the Long Dock space for the year 1931 averaging \$2.76 per ton (R. 161), without considering a return on the value of the land on which the building is located. At the time of the second hearing, the Erie conceded that the charges for similar storage were then no more compensatory than at the time of the first hearing. (R. 363, 363) The loss suffered by the Erie on freight so stored in its space leased from the "Seaboard" aggregated \$6.18 per ton. (R. 163) See p. 18, *supra*.

4. The Baltimore and Ohio Railroad, for its west-bound storage under the in transit privilege, utilized space in the facilities of the Pouch Terminal and American Dock Stores, Staten Island, for which it paid 55 cents per square foot per annum. (R. 47) In the Commission's second report the rate is noted as 45 cents per square foot per annum. (R. 128) This carrier did not construct and place on the market new facilities. The General Manager of the Baltimore & Ohio, re minimum expense on rubber stored in leased space at Pouch Stores, computed the "net expense" as \$4.23 per ton. He added \$3.46 for labor in and out, \$2.00 per ton for lightering or trucking, and \$0.207 for agent or clerk, totaling terminal and storage expense of \$8.897 per ton, to be absorbed by the carrier before rail movement began. (R. 48) The then rate on rubber to Akron, Ohio, was \$9.40 per ton and the Baltimore & Ohio proportion was \$8.36 per ton. The rate from New York to Akron has since been reduced to \$8.00 per ton. (R. 49) In its second report the Commis-

sion set forth the total expense per ton on rubber west-bound, Baltimore & Ohio, at \$7.06 per ton, with a resulting loss of \$4.53 per ton, on rubber stored for one year. The transit privilege for rubber extends for 30 months. It stated that such loss is absorbed by the Baltimore and Ohio out of its line haul revenues. (R. 128, 362)

5. The Pennsylvania Railroad performs its west-bound storage under the in-transit privilege using space in its Greenville pier at Jersey City, a covered single-deck pier, 210 feet wide and over 1000 feet long, and on its two-story piers K and L at Jersey City. (R. 63, 355) The Commission pointed out it was unable to separate or apportion the investment or overhead on these piers, and that this was *due to the commingling of lightering and storage freight* in the same location. It found that all handling of freight at the Greenville and other piers of this carrier was done by contract labor, at a rate of 44.45 cents per ton for each handling, August 10, 1931, which was reduced to 40 cents per ton for each handling on March 1, 1932. This was double the Pennsylvania's published handling charge on crude rubber and wood pulp. (R. 64, 359)

6. The New York Central, for this west-bound storage under the in transit privilege, uses space in its Rossiter Stores, a six-story warehouse building on 59th Street, near the Hudson River, New York City, and on its Weehawken and other piers. In its first report the Commission found that the New York Central paid 2 cents per hundred pounds to the Linde Company stores for the first thirty days storage, plus 1 cent per hundred pounds for each additional fifteen days, plus 4 cents per hundred pounds for handling in and out of storage; that the carrier collects 1.5 cents per hundred pounds for the first thirty days storage, .5 cents for each succeeding 15 days, or fraction thereof, and 1 cent for handling in and out of storage. (R. 82) In its second report the Commission pointed out that in some respects the New York Central indicated a disposition to follow the first

report, but that progress was not made to any extent in that direction, due to the lack of cooperation on the part of certain other appellants. (R. 167)

7. The Central Railroad Company of New Jersey uses space in its Jersey piers 5, 11 and 14 for the storage of west-bound "in-transit" freight. These are single-deck covered piers of steel and concrete constructions. The Commission set forth in detail the costs of operations and the revenues from storing and handling charges in its first report. (R. 55) It specifically found the average handling costs at these piers, whether from car to dock or from dock to car, is 42.8 cents per ton, and for necessary double handling 85.6 cents per ton. The shipper who so may arrange for such services is charged 20 cents per ton, handling. (R. 55, 359) The Commission pointed out that manifestly the carrier must bear the deficit in its operation. (R. 55)

The *summarized findings regarding the west-bound storage of freight under the in-transit privilege for all appellants*, jointly, are discussed under paragraph (c).

While the above findings of the Commission concerned storage and handling of west-bound freight under the in-transit privilege, the Commission particularly and separately dealt with the storage of west-bound carload freight at New York in its second report, beginning at the bottom of page 179 of this record, and then summarized the principal findings of fact regarding the so-called "storage in-transit" and services incidental thereto. (R. 196) Since the summarized findings relate also to insurance practices of appellants, they are dealt with hereinafter in paragraph (e) following the Commission's findings concerning insurance practices of appellants.

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Regarding (d), the insurance practices of appellants, the Commission, for each of them, found:

1. The Baltimore & Ohio, prior to September 6, 1930, maintained an insurance rate of \$1.73 per year per

\$100 of value to cover west-bound freight, stored under in-transit privilege on its piers at Staten Island. Some warehouses of competing lines enjoyed more favorable terms. The B. & O. adopted the so-called eight cent rate, effective September 6, 1930. It protects its liability by insurance. (R. 50) During 1931 this carrier collected \$793.52 from shippers for insurance on this west-bound "transit" freight and paid out to insurance companies during the same year \$2,861.07. (R. 51) In its space leased from American Dock and Pouch Terminal this carrier loses up to 7 cents per \$100 of value on insurance.

2. The Central Railroad Company of New Jersey, contrary to the practice of the other appellants does not publish an insurance rate of 8 cents per \$100 of value on freight stored under in-transit arrangements at its terminals. At piers 11 and 14, its insurance rate is \$1.29 per \$100 of value. It has refused to lower this rate to conform with the change made by other appellants. (R. 55, 56).

3. The Lehigh Valley charges the 8 cent rate. It does not re-insure. To date it has had no losses. As of June 1, 1935, this carrier had in storage commodities valued at over one million dollars. (R. 62, 195, 365)

4. The Pennsylvania found, on numerous occasions, that because of its high insurance rate, it was unable to compete with other appellants for west-bound "storage in-transit" freight. (R. 66) While this carrier doubted the legality of an arrangement for a uniform 8-cent rate it reluctantly became a party thereto with other appellants to meet their competition. (R. 66) The Commission found that on a typical carload of rubber, moving from New York to Akron, (40,000-pound car) value of 17 cents per pound, or a total of \$6,800 per car, the amount that the Pennsylvania absorbs per car, at pier C, is \$124.10; at pier K, \$13.39; at pier L, \$92.00; at its Greenville pier, \$108.80. (R. 67) The Pennsylvania, as set forth in the second report of the Commission, takes care of the insurance in its own insurance department (R. 195) and thereby absorbs about 7 cents per \$100 of value per annum. (R. 195, 365).

5. The Delaware & Lackawanna Railroad applies the 8 cents per \$100 of value as the insurance rate applicable to freight stored under in-transit privilege, westbound movement. It covers its liability by re-insuring at a rate of 35 cents per \$100 of value per annum and absorbs the difference. (R. 76) However, that finding refers to insurance on storage at piers. Like the Erie Railroad this appellant's most important storage facility is a modern warehouse where the insurance rate is 6 cents per \$100 of value per annum. (R. 195)

6. The New York Central has made no change in its insurance practices since the first report of the Commission was issued. It does not re-insure the property stored. In June, 1931, it paid a claim of \$5,382.00 for damage by fire on 10,000 bags of stored sugar. At the time of the second hearing, the amount of its insurance covered by the 8-cent rate was \$87,877.00. (R. 195, 365)

7. The Erie Railroad has important storage facilities on which the insurance rates are 6 cents per \$100 of value per annum. The Commission also found that the record indicates that on other facilities where goods insured by the Erie are stored, the insurance rate is considerably above 8 cents per \$100 of value per annum, but is not clear as to whether or not the Erie re-insures the freight with insurance companies. (R. 194)

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With reference to (c), the summarized or principal findings of fact regarding the practices of all appellants, relating to voluntary warehousing of west-bound freight, stored in facilities where the storage-in-transit privileges are applicable; the Commission pointed out, before making this summary, that the storage rates were revised and increased on certain commodities, but that this did not, however, apply to crude rubber and wood pulp, which commodities amount to approximately 75 per cent of the west-bound

freight stored at the Port of New York. (R. 180, 354, 357) The Commission clearly pointed out that *no pretense is made that the storage and handling rates on crude rubber and wood pulp are compensatory* and stated that in most cases it is not contended on this record that the rates and charges on goods stored under the in-transit privilege compensate the carriers for the cost of storage and handling. (R. 182, 361, 362, 363) The Commission considered the claim of appellants respecting their fears of loss of business to other ports and other forms of transportation, finding that certain shippers successfully resist the imposition of higher storage rates on their commodities, while many others are compelled to pay increased charges on their commodities, and then stated that the record is not convincing that it would be advantageous to shippers to divert a substantial amount of rubber or other traffic to other ports or to other forms of transportation if the storage rates on such traffic should be increased. (R. 183, 184)

At page 186 of this record the Commission summarized the cost data from an exhibit of record, finding the average cost to all appellants for storing coffee and other named commodities (not including rubber or wood pulp) was 71 cents per ton per month, and the handling cost was 44 cents, making a total cost of storing for one month and one handling of \$1.15; if such goods remain in storage longer than one month the carrier's cost for the second month is 71 cents while the shipper pays only 60 cents; the longer the storage period the greater the loss. (R. 187, 374)

On rubber the average cost per month for storage was 50.46 cents per ton, and for each handling 44 cents per ton. The carrier's charge is 30 cents per ton for the first month and 10 cents per ton for each succeeding 15 days, or fraction thereof. When rubber is stored for one 30-day period, and two handlings necessary, the average cost to appellants totals \$1.3846 per ton. The tariff charged (1933) was 70 cents per ton for the storage and handling, netting a loss of 68.46 cents for each ton so stored and handled. For each

successive thirty day period there was a storage loss alone of 30.46 cents per ton. (R. 187) Similarly, the losses on wood pulp were found by the Commission. (R. 187)

The Commission pointed out, at pages 187 and 188 of the record, that extra handlings are frequent and that in certain cases the goods must be handled a third time, finding that the cost of the two extra handlings is borne by the carrier and not by the shipper, although it is to the shipper's commercial interest to avail himself of the storage facilities. (R. 188) *The Commission specifically noted that this commercial warehousing service performed in relation to the westbound freight, is a convenience for the commercial interest of the owner of the goods, proven by the fact that the transit period has been extended from time to time for the convenience of the shipper.* (R. 189)

The Commission explicitly stated, at the top of page 190 of this record, "We are not to be understood as condemning bona fide transit arrangements, but only the practices here considered by which the carriers, through stress of competition, have assumed by tariff publication a part of the costs of strictly commercial storage and handling of goods." (R. 367) It went on to say, in the next paragraph, on page 190, "The fact that the carriers' tariffs designate the storage as in-transit storage was considered in the prior report, but we found that such designation did not invest this storage with the characteristic of storage in transit. Tariffs are but forms of words, and in administering the act we can look beyond the forms to what causes them, and what they are intended to cause and do cause."

Following this finding, the Commission affirmed its previous findings (R. 191) and stated, explicitly, "It is established beyond doubt that *each of the respondent carriers [appellants] in attempting to stimulate traffic for its line, under the guise of storage-in-transit tariffs, provides commercial storage and handling to certain persons for less than the cost of those services. The respondents [appellants] thus reduce the transportation rates to such per-*

*sons to the extent of the difference between the sale prices of the storage and handling and the cost thereof."* (R. 191) (Emphasis supplied.)

Thereafter, the Commission made the following summary of principal findings of fact with respect to this so-called "in-transit storage," and services incidental thereto, including insurance and handling. (R. 196, 197; 367, 368, 369):

"1. Each of the seven Class I respondent carriers considered herein provides by tariff publication for storage, handling, and with the exception of the Jersey Central for insurance, of carload freight in warehouses, buildings, or piers owned or controlled by it or by companies with which it is affiliated.

"2. The storage, handling and insurance arrangements provided under respondents' tariffs, considered in the discussion herein in connection with the storage of east-bound and west-bound carload freight and insurance, are not services incidental to transportation, but are commercial services. Similar commercial services are performed by competing warehouse companies in the Port of New York district, which are not owned or controlled by, or affiliated with, respondents.

"3. The tariffs providing said services are a part of a scheme devised to purchase competitive traffic, and through said tariffs the respondents hold themselves out to perform or furnish commercial services under the guise of transportation services.

"4. The said tariffs are instruments which work violation of the act \* \* \*

"5. The respondents deal in and furnish commercial storage, handling, and insurance of goods at rates and charges which do not re-imburse them for the full cost of providing such services independent of freight rates thereby assuming a part of the cost of conducting the commercial operations of shippers who store goods in their owned, controlled, or affiliated warehouse buildings or piers.

"6. The respondents do not assume or bear any part of the cost of conducting the commercial operations of competing shippers who store goods in warehouses operated by said competing warehouse companies."

Upon these findings and upon other facts, as found in its reports, the Commission found and concluded, in respect of the so-called "in-transit storage," and services incidental thereto, as follows:

"We find that, exclusive of storage and handling directly incident to immediate transportation or immediate delivery of goods, the storage, handling, and insurance of goods under tariff arrangements in warehouses or piers owned or controlled by, or affiliated with, respondent carriers, as described of record and discussed herein, are commercial services provided to certain shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost thereof.

"We further find that the provision by respondents of said commercial storage, handling, and insurance at such non-compensatory rates and charges reduces below the published tariff rates the transportation charges paid by certain shippers in interstate commerce, whose goods are so stored, handled and insured, and results in concessions to said shippers to the extent of the difference between the cost to said respondents of providing such storage, handling and insurance, and the amount which they receive therefor.

"We further find that through such storage, handling, and insurance arrangements, and by granting such concessions, the respondent carriers are guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, make and give undue and unreasonable preferences and advantages to certain shippers in interstate commerce, in violation of section 3 of said act, and depart from their published tariffs in violation of section 6 of said act.

"We are not to be understood as here condemning bona fide stoppage and storage in transit as permitted generally by carriers throughout the country, for the purpose of milling, manufacturing, or similarly trade processing the commodities stopped or stored.

"We affirm our prior findings that the respondents' warehousing and storage practices, charges assessed therefore, allowances made in connection therewith, and the insurance of goods as hereinbefore described in the Port of New York district, dissipate respondents'

funds and revenues, are not in conformity with efficient and economical management, as contemplated by the Interstate Commerce Act, and are not in the public interest." (R. 196-198)

In its third and last report, the Commission affirmed its findings of fact and conclusions of law as shown in its two prior reports, excepting, however, that after reviewing its administrative practices of many years the Commission acceded to the request of appellants that the commercial rates and charges in connection with the westbound traffic commercially stored under in-transit privileges, in appellants' facilities, should be published in tariffs filed with the Commission. (R. 271) In this connection, however, the Commission explicitly stated:

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the act."

## SUMMARY OF ARGUMENT.

**A.** Appellants' purposes, in performing commercial warehousing services for certain shippers, or leasing space to them without regard to cost and the prohibitions of the act, are to purchase traffic. This results in line haul rate rebates which the Commission may enjoin.

**B.** The performance of commercial warehousing services, voluntary storage and related services, are not within appellants' common-carrier duties.

**C.** Nothing in the Commission's order deprives appellants of their property.

**D.** Appellants assume their major premises in adducing that the Commission's findings are insufficient in law, and that the services performed are transportation services.

## ARGUMENT.

**A—Appellants' purposes, in performing commercial warehousing services for certain shippers, or leasing space to them without regard to cost and the prohibitions of the act, are to purchase traffic. This results in line haul rate rebates which the Commission may enjoin.**

The purposes of the appellants in performing these commercial warehousing services or leasing storage facilities are clearly to prefer certain shippers, to discriminate against the private warehousemen, also shippers, and thus to "grab traffic" and compete with one another. As is later more fully brought out, effectuation of these purposes disregards the placing in the hands of certain shippers opportunity to compete and ship at great advantage over others. These purposes wilfully and designedly do not take into account the prohibitions of the Interstate Commerce Act.

The findings of the Commission as to appellants' motives in engaging in commercial warehousing, or leasing such

facilities, were that appellants sought to induce shippers to use their rail facilities in their competitive struggle with one another. (R. 124, 125, 348, 349) These appellants expect to recoup their losses through rail transportation revenues and it appears of little concern to them that these commercial services are furnished at less than cost—their activities are designed to grab traffic—particularly from one another. First, one or another began it and then the vicious circle was entered. (Ibid)

These appellants sought out the larger, or principal, shippers; it was their traffic which was sought; it was they who were offered *lower rates for warehousing services and space than those of the private warehousemen*. (R. 105) These were non-compensatory rates and charges, as the important west-bound traffic situation clearly discloses. (R. 106, 183, 349) And the Commission, at the same time, found that these inducements were made without due regard for expenditures and profitableness of the business. Neither prevailing market nor even cost mattered. (R. 105-107; 124-126; 348-350)

The complaining private warehousemen claim that a large part of the value of their facilities has been confiscated and destroyed by these appellants' traffic grabbing practices—engaging in these commercial warehousing activities at less than cost—and the Commission found that *the testimony and exhibits introduced by these private warehousemen, which showed that they have lost business in practically every form of warehousing to appellants' affiliated and storage companies stand absolutely unrefuted*. (R. 97, 98, 126, 349, 350)

Independent warehouses cannot continue in business and at the same time lease space or store goods at charges below cost. From the record the Commission stated this was obvious. (R. 138) And as to space rental activity, another way of providing storage facilities in this instance, here again the testimony and exhibits of the commercial warehousemen stand unrefuted, *as further evidenced by the*

finding of the Commission that these appellants, directly or indirectly, rent space in piers or warehouse buildings to certain shippers, and the rental exacted is not only below the prevailing rates, but is non-compensatory. (R. 107) While these appellants have sought and recouped their losses in commercial warehousing operations from their line haul revenues, in accordance with their motive and purpose to grab traffic, those private warehousemen who are engaged solely in the warehousing business, the Commission finds, must depend entirely upon that business for revenue and profit. (R. 124, 125; 348, 349)

The motive of the carriers, therefore, blinds them to the dissipation of their funds and revenues, to efficient and economical management and is in disregard of the public interest. (R. 198, 369) Private warehousemen, however, store, handle and ship goods over appellants' lines and are dependent for their very existence upon appellants' transportation services in their business, such service coupled with reasonable and non-discriminatory rates and practices. (R. 97, 346)

These appellants erected or acquired enormous amounts of warehousing facilities, when, as the Commission found, more than ample such commercial warehousing facilities were already available. (R. 125, 126, 350) One of the Commission's findings was that the record before it indicated that because of insufficient prospective earnings it would not have been possible to have raised capital with which to have constructed the new warehouses without the use of railroad credit and funds. (R. 126) While most of the appellants constructed expensive new warehousing facilities, one of them, the B. & O., engaged in this glorious gamble for traffic by renting existing facilities on Staten Island.\*

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\* Referring to the fact that the Baltimore & Ohio did not construct such commercial warehousing facilities as did its competitors, the General Freight Traffic Manager of the B. & O. testified, inter alia: "In October, 1929, the Baltimore & Ohio found its crude rubber business falling off, both actually and relatively. This it

The principle does not vary, be the facilities leased, purchased or constructed by the appellants who devote them to commercial warehousing uses or so lease them to shippers to grab traffic.

Having shown that the Commission so clearly has found the motive and purpose of appellants in engaging in these commercial warehousing services, or storage space rentals, that they do so by offering the larger shippers lower rates for warehousing services and space than those of private warehousemen, and without due regard for expenditures and profitability of the business, offer these services and facilities at non-compensatory rates and charges, *we shall use the B. & O. as an illustration to show just how these described activities result in line haul rates rebates.* Important as the storage space rentals and other condemned activities of appellants are, they are *relatively* of much lesser importance than the serious far-reaching west-bound storage activities.

The American Dock Terminal and Pouch Stores at Staten Island enjoy the storage in-transit privilege. (R. 355, 356) The B. & O. leases some of the space in these facilities to enable it to maintain its position among the other

believed to be due to the lower insurance rates in the facilities of its competitors and to the superiority of those facilities themselves; and it cast about for ways and means to improve its competitive position. It could have done as some of its competitors had done, i.e., construct a new pier with modern warehouse facilities, but it did not seem to be the part of wisdom to do this." (T. T. 2774) He went on, however, after mentioning the excess of facilities available, to point out that: "We could not, however, sit idly by and see our competitors take the cream of our traffic away from us, and we were forced to adopt some expedient to meet this situation. . . . The American Dock and the Pouch Terminals, located on the waterfront, and on the tracks of . . . a Baltimore & Ohio affiliate, with warehouse facilities fairly comparable with the facilities of our competitors, seemed to afford the logical solution to our difficulties. In these facilities space could be leased in quantities as desired. The elasticity of the arrangement appealed greatly— . . . that we are never paying carrying charges on unoccupied space . . . " (T. T. 2774, 2775)

appellants and to obtain satisfactory results from a solicitation and traffic producing standpoint. It leases and enlarges the amount of leased space as it needs it, (buys its use). (R. 355) Some light is shed upon this finding of the Court and the Commission, by the B. & O. testimony in the footnote, *supra*. By performing the commercial warehousing services, handling, storage and insurance below cost in these leased facilities, in 1931, the B. & O. found the result was a net loss averaging \$2.48 per ton at American Dock, and \$2.26 per ton at Pouch Stores on the goods so stored. (R. 361, 362) At present the total loss to the B. & O. in connection with the traffic handled in these facilities, stored for one year, and handled out, amounts to \$4.53 per ton, and this loss is absorbed out of this appellant's rates for the line haul transportation of the rubber stored, such line haul rate being, to a typical destination, \$8.00 per ton. (R. 362) On each ton of freight insured at these leased facilities at the 8 cent per \$100.00 of value rate, the B. & O. absorbs or pays about 7 cents more. (R. 51, 194, 365)

This concession from the line haul rate is clearly a rebate and is prohibited under the provisions of the Interstate Commerce Act. In *Wight v. U. S.*, 167 U. S. 512, 17 S. C. R. 822, this Honorable Court, speaking through Mr. Justice Brewer, stated, referring to section 2 of the Interstate Commerce Act, (page 823):

"The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another."

In *New York, New Haven & Hartford Railroad Company v. I. C. C.*, 200 U. S. 361, 26 S. C. R. 272, this Honorable Court, through Mr. Justice White, in connection with the sale of coal transported (and here we have the sale of a commercial service) where the total money received from the commercial transaction and the transportation of the

commodity was less than the cost and the published tariff charges, held as follows:

"Now, in view of the positive command of the 2nd section of the act, that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." (P. 277)

In this New Haven coal case, as this Honorable Court pointed out,

" . . . the Chesapeake & Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates." (P. 279)

The Commission's findings in the instant case show an identical disregard, show little concern on the part of appellants that the commercial warehousing services were furnished at less than cost. (R. 105, 107; 124, 125; 348, 349) This Honorable Court (in the New Haven coal case) went on to say:

"Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of ocean carriage, etc., the gross sum realized

was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates." (P. 279)

This Honorable Court concluded, therefore, that:

" . . . the contracts made by the Chesapeake & Ohio with the New Haven were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce . . . " (P. 281)

That these concessions by appellants, as illustrated in this B. & O. example are prohibited under the provisions of the Interstate Commerce Act, is further borne out by the decision of this Honorable Court in *United States, et al. v. American Sheet & Tin Plate Co., et al.*, 301 U. S. 402, 57 S. C. R. 804, in which case Mr. Justice Roberts delivered the opinion of the Court. The findings in that case showed that the "spotting service" was not a transportation service which the carriers were obligated to perform in respect of receipt and delivery of freight (P. 807); this service, suiting the commercial needs of shippers and consignees, was a spotting service beyond transportation obligation of the carriers. It occurred at the beginning or end of transportation, while in the B. & O. illustration here before us the service found by the Commission to be commercial warehousing, which the carriers are not obligated to perform, occurs shortly after the first step in the transportation of the commodity from ship-side to interior destination. In this *American Sheet & Tin Plate case*, the allowance or concession was published; in the B. & O. example, and re all westbound so-called "transit freight," it is published; and in the instant case the Interstate Commerce Commission condemned:

" . . . the fact that the respondents [appellants] have voluntarily engaged in storage and warehousing services which are not within their common-carrier

obligations, and by providing such services to shippers below the cost of such services, reduced the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the act." (R. 271)

In the *American Sheet & Tin Plate case*, in respect to such commercial services this Honorable Court stated:

"The Interstate Commerce Commission is authorized and required to enforce the provisions of the act and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, 'or otherwise in violation of any of the provisions of this act (chapter),' to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist." (P. 807)

This Honorable Court went on to say:

"Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it." (Pp. 807, 808)

In the instant case the allowance or concession, or rebate, is that from which the Commission, in the proper exercise of its power, has ordered the appellants to cease, desist and abstain.

The means by which appellants' purposes are being accomplished, resulting in concessions or rebates which the

Commission has power to enjoin, (as this B. & O. illustration, *supra*, shows), are the performing of commercial services at non-compensatory charges, charges below cost. Cost in and of itself is a definite term; clearly it may be made certain; it is clearly determinable and that which is definitely determinable is certainly definite. This term has been used by the Commission many times in the past, and by this Honorable Court, as for example, by the Interstate Commerce Commission *In Re Refrigeration Charges on Fruits, etc., from the South*, 151 I. C. C. 649, 654; and this Honorable Court in *Nor. Pac. Ry. v. North Dakota*, 236 U. S. 585, 596, 604. Both the Commission and the specially constituted District Court found a formula for determining costs\* was used by warehousemen to arrive at rates. (R.

\* The formula for determining warehouse costs and thereby a basis for warehousing rates was the subject of testimony and evidence in both the first and second hearings of the Commission; detailed testimony, unrefuted, also appears in the second proceeding of the Commission in the examination of Witness Wilson V. Little, beginning at page 3896 of the Transcript of Testimony. Exhibit A-64, placed in evidence by Witness Little, sets forth the warehousing trade method for determining reasonable costs under the National Recovery Administration approval, and at page 3901 of the Transcript of Testimony, Witness Little distinguishes " \* \* \* between the cost accounting methods recommended by the merchandise division of the Association for the industry, and the cost accounting methods approved by \* \* \* " the N. R. A. He testified that "The difference between the two, fundamentally, is that the purpose of the cost set-up in our Encyclopedia is to establish compensatory rates, whereas the cost method that was approved by the National Recovery Administration was solely for the purpose of establishing cost per se, and the National Recovery Administration in okaying its method did not allow as a cost factor anything that looked in the way of being income on capital; so the cost method that was approved by the N. R. A. for our industry contained no factor for interest on investment." This witness testified that the American Warehousemen's Association, Merchandise Division (T.T. 3900) began to formulate a cost accounting procedure in 1918, published the recognized cost method for the trade in 1923, and, as just quoted, the industry's cost accounting method was that approved by the N. R. A. By reference to the exhibit A-64 for an understanding of the industry's cost accounting method, it is obvi-

41, 187, 374) It is the performance of these commercial services below cost, resulting in line-haul tariff rate concessions, allowances or rebates, which the Commission finds results in the violations of the Act. And it is this means that the Commission's order enjoins. All the Commission does is to require that these appellants, in respect of their violation of the prohibitions of the act,

“ . . . cease employing the means by which it had been accomplished”. *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, 514; 51 S. C. R. 505.

In this *Merchants Warehouse case* the carriers had contracts with warehousemen to perform certain services for which the carriers paid a stipulated compensation, and one carrier made such provision for this allowance in its published tariff. The Commission and the Court below made findings that these warehouses were confined to warehousing of merchandise for patrons, and the services performed by these warehousemen under their contracts with the railroads for which they received the allowances were in fact performed for the owners of the merchandise rather than for the railroads. In this *Merchants Warehouse case*, as in the instant case, the shippers using public warehouse fa-

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ous that for rate-making purposes the rent in the *plant expense*, or other operating costs set forth on page 6 of that exhibit, if the facility is owned, *should be based on such present values as to give a fair rental amount as of today, no matter what be the original cost of the building.* This is clear from pages 6 and 9 of Exhibit A-64, and from Witness Little's full testimony. This was covered in more detail in the Commission's first hearing by two witnesses. (H. E. S. Wilson, T. T. 1011-1088; C. B. Carruth, T. T. 1626-1675; 1729-1754.) These references to the Transcript of Testimony are made because it is believed they shed considerable light upon the findings of the Commission and the Court respecting the Commission's use of the term "cost" in re commercial warehousing operations. Exhibit A-64 sets forth, further, that when the square foot cost of occupied space (on a two-thirds occupancy basis, which is the "average occupied space" over an annual period) has been ascertained, available actuarial tables may be applied to determine storage charges necessary to return the actual cost of "storage". (P. 10 of Ex. A-64)

cilities were found to select generally the company offering the lowest aggregate charge for the distribution of their goods, and, by reason of the allowances made, or rebates, the "contract warehouses" were able to quote lower prices than their competitors and thus secure business which otherwise would go to the latter. For in the instant case, the appellants offer and provide lower rates for the commercial warehousing services and for space rentals than the private warehousemen. (B. 105, 107) This the B. & O. example clearly shows.

In the *Merchants Warehouse case*, and here, the real purpose was to obtain the freight shipments over the lines of the competing carriers. In the *Merchants Warehouse case* this Honorable Court pointed out, through Mr. Justice Stone, in regard to the service rendered by the warehousemen for which the allowance was made, that the service rendered was one which

" \* \* \* if performed by it would nullify its published rates for carloads transportation service".—citing the *New Haven case*, supra. (P. 508)

This Honorable Court stated:

"Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation. *Union Pacific R. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 220; 32 S. Ct. 39; 56 L. Ed. 171. Appellants rely on *Interstate Commerce Commission v. Diefenbaugh*, 222 U. S. 42; 32 S. Ct. 22; 56 L. Ed. 83, but it is distinguishable from both the present and the Updike case in that it did not involve discrimination among shippers or consignees, which was condemned in the latter." (P. 509)

What has been heretofore argued regarding engaging in the commercial warehousing business, preferring certain shippers, grabbing traffic, undercutting commercial public

warehousemen, performing the commercial services below cost, and regardless of what it costs, with resultant concessions from the line-haul tariff rates assessed on the goods so stored and transported, likewise applies to space rentals of warehousing facilities to shippers. What matters it, in principle, if the B. & O. pays 45 cents or 55 cents per square foot per annum for needed warehouse space and then, on a commodity storage charge basis, in order to purchase or grab traffic, sells its services therein performed as a commercial warehouseman at less than cost for storage, handling, and insurance, thereby reducing (rebating) its line-haul charges as tariffed for its transportation, or, whether it re-lease this same space to a shipper for storage or for a warehouse to aid it to prefer customers-shippers, (or for a warehouse-shipper), and thus obtain his (its) traffic, and re-leasing does so at 25 cents per square foot per annum, or 10 cents? The principle is the same, obviously.

Taking, for example, the situation of the Newark Warehouse of the Central Railroad of New Jersey, wherein the Commission found that the present operations of the Newark Central Warehouse Company in commercial warehousing, through the present leasing arrangement, are in substance and fact subsidized by appellant carrier. (R. 158) This subsidized concern,\* the Commission cites the testimony to show, under its "arrangement" competes with private warehousemen by offering storage rates and handling charges averaging "48.47 and 63.74 per cent, respectively, below the storage and handling charges \* \* \* " otherwise available in competing facilities. (R. 158) Here again it is found that traffic considerations are the motive and cause. The Commission, re the adjunct of the Jersey Central's traffic department, among other facts found that

\* The first year rent paid was slightly less than one-half of the taxes on the building for that period. The rent that year was \$17,217. Repairs and depreciation amounted to over \$60,000 that year also. (R. 157)

through this leasing arrangement, described of record, the carrier directly bears part of the lessee company's commercial warehousing expense\*\* and that so doing violates sections 2, 3 and 6 of the Interstate Commerce Act because of the resulting "concessions"—rebates. (R. 159, 160) The difference between cost and the present below cost lease basis is the "concession", herein termed rebate (*ibid*). The B. & O. example and argument fully applies. (See also: *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849; *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292, and here the traffic motive and tariff concessions are present.)

In the *Merchants Warehouse case*, *supra*, at page 509, this Honorable Court stated:

"Such allowances are forbidden, even though paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by sections 2 and 3 of the Interstate Commerce Act": Citing: *Lehigh Valley R. R. v. U. S.*, 243 U. S. 444, 446; *U. S. v. Union Stock Yard*, 226 U. S. 286.

**B—The performance of commercial warehousing services, voluntary storage and related services, are not within appellants' common carrier duties.**

The business of a railroad is transportation, not storage. *In Re Demurrage Investigation*, 19 I. C. C. 496. The term "transportation" as used in section 1(3) of the Interstate Commerce Act, while it includes the word "storage", does not include *commercial warehousing services*. As the Commission set forth in its findings in this case,

"Storage of property transported is a transportation service only to the extent that the storage is nec-

\*\*That company is a "person" under section 2. (R. 158) Some light is shed on this finding in the testimony of the carrier's comptroller re the below normal rental or storage charges position of the lessee to clients of the warehouse. The comptroller stated: "From the viewpoint of contracts, the gates are wide-open". (T. T. 3368)

essarily incidental to transporting such property, and the term is used in section 1 in that limited sense". (R. 189)

The Commission performed its obligation and its duty in this case by determining, as the act requires of it,—when transportation, as defined in the act, begins and ends, and by determining whether or not the condemned acts or services incident to the conveyance of goods from one point to another are or are not a part of transportation which common carriers subject to the act are obligated to perform. It discussed the transit arrangements or transit privilege in detail (R. 189) and clearly concluded in each of its reports that the practices which its order seeks to enjoin are commercial, not transportation, services or duties. It distinguished voluntary and involuntary storage, and, as set forth by this Honorable Court in *Cleveland & St. Louis R. Co. v. Dettlebach*, 239 U. S. 588, and in *Southern Ry. Co. v. Prescott*, 240 U. S. 632, placed involuntary storage within the carriers' obligation and duties, something not within their election to perform, but a service obligatory under the bill of lading contract.

In the case here before you, no one can require that the storage services (or space rentals) be furnished by appellants; no part of the carriers' transportation obligation is unfulfilled by not engaging in these commercial activities. In the *Dettlebach* and *Prescott* cases, *supra*, however, goods had been transported to destination; parties entitled to receive them failed to remove them within the free time, and the goods were left, *involuntarily*, so far as the carriers were concerned, in their possession. Under such circumstances the necessary storage service clearly was involuntarily performed and was a service in the performance of which penalty storage charges were applicable. We may note, also, that in these two cases there was involved no discrimination against shippers or other persons, nor was there involved any depletion of line-haul revenues, as in the instant case.

The fact that any tariffs of any nature had been filed with the Commission covering these commercial and non-transportation services does not preclude the Commission from enjoining a carrier to cease employing the means by which it accomplishes discriminations. For

"Where a forbidden discrimination is made, the mere fact . . . that the machinery for making it is in tariff form, cannot clothe it with immunity". *Merchants Warehouse Co. v. U. S.*, *supra*, p. 509; citing *Louisville & Nashville R. R. Co. v. I. C. C.*, 282 U. S. 740.

Your Honorable Court decided the question relating to the authority of the Commission to determine what is and what is not a transportation service in very clear language in the *American Sheet & Tin Plate case*, *supra*, at page 807, wherein it is stated:

"The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service." Citing *Los Angeles Switching Case*, 234 U. S. 294, 311; *Merchants Warehouse Co. v. U. S.*, *supra*.

It can not, therefore, be argued that these commercial warehousing services are transportation services, or that thereby the *primary questions*,—the erasing of the unjust discriminations, undue prejudice and undue preferences; estopping the violations of section 6 of the act; abstaining from the granting of concessions from the line-haul rates; ceasing the condemned practices deemed contrary to public policy and which dissipate appellants' funds and revenues contrary to efficient and economical management as contemplated by the Interstate Commerce Act;—that thereby these primary questions can be hid behind any kind of a tariff for any of these condemned practices. No condemned tariff can be used by which to turn these commercial services into transportation services—to transfer these commercial transactions into transportation duties of appellants.

**C—Nothing in the Commission's order deprives appellants of their property.**

While there is nothing in this order of the Commission which deprives appellants of their property in contravention of the Fifth Amendment of the Constitution, it is respectfully submitted that the complaining warehousemen who have placed unrefuted testimony and exhibits before the Commission (R. 97, 98, 126, 349, 350), have consistently set forth that a large part of the value of their warehouse properties has been confiscated and destroyed by the condemned-as-unlawful practices of appellants here who are engaging in commercial warehousing operations and charging rates not only below what the competing warehousemen offer (R. 105), this to induce the traffic to their rails in their vicious competition one with the other (R. 124, 125, 348, 349), but also at non-compensatory rates and charges which reduce the cost to certain shippers for the transportation of their goods. (R. 271)

The law is well settled with regard to the finality of an order of this Commission. In *I. C. C. v. Union Pac. Ry. Co.*, 222 U. S. 541; 32 S. Ct. 108, 111, this Honorable Court clearly set forth that the orders of the Interstate Commerce Commission were final unless they were:

“ . . . (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.”

## Citing:

*I. C. C. v. Illinois Central R. R.*, 215 U. S. 470,  
*Southern P. Co. v. I. C. C.*, 219 U. S. 433,  
*I. C. C. v. Northern P. R. R. Co.*, 216 U. S. 544,  
*I. C. C. v. Alabama Midland R. Co.*, 168 U. S. 146.

Assuredly a requirement that cost be obtained for services or space is not confiscatory. There is no question whatsoever presented by appellants with respect to the sufficiency of the evidence, nor is there any unreasonableness in the exercise of the Commission's authority. Each of the above requirements set out by your Honorable Court has been met in this case. Contrary to any injury accruing to the appellants, they still seek license to continue to violate civil and criminal provisions of regulating statutes, and to impair and destroy the business and value of the properties of the complaining warehouse companies. These concessions, allowances, rebates if you please, of appellants who are wilfully disregarding and violating the act, assuredly give them no constitutional right thereby to build up their business, here a non-common carrier business, a purely commercial warehousing business, contrary to the statutes. Your Honorable Court referred to and settled such a contention in *O'Keefe v. United States*, 240 U. S. 294, 304, as follows:

"The final contention, which is that the Commission's order in effect deprives the New Orleans, Texas & Mexico of its property without due process of law, by denying to it the right to contract and compete for traffic originating on the line of the Louisiana & Pacific, is transparently unsound. The trunk line has no constitutional right to build up its business by paying bonuses, or rebates, that have been forbidden by act of Congress from considerations affecting the public welfare."

Furthermore, appellants knew, or should have known, when they entered, in one form and manner, or another into

the commercial storing or leasing of space for warehousing that the prohibitions of the statute were mandatory. Over forty years ago, in *American Warehousemen's Association v. Illinois Central R. R. Co., et al.*, 7 I. C. C. 556, over thirty years ago in the *New Haven Coal case, supra*, over twenty years ago in *American Pulp and Paper Assn. v. B. & O. R. Co.*, 41 I. C. C. 506, 511, 513, and again in the *Merchants Warehouse case, supra*, more recently, and in the *American Sheet and Tin Plate Company case, supra*, each of the appellants knew, or should have known or learned that such rebating or concession activities to "purchase traffic", could not be held out to be performed at less than the cost thereof. Furthermore, the principles as set forth in the *New Haven Coal case, supra*, have been reaffirmed in many other cases before your Honorable Court, including:

*Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 477,

*U. S. v. P. Koenig Coal Co.*, 270 U. S. 512, 519,

*Louisville & Nashville R. R. Co. v. U. S. (I. C. C.)*, 282 U. S. 740.

**D—Appellants assume their major premises in adducing that the Commission's findings are insufficient in law, and that the services performed are transportation services.**

In the first three points argued by appellants, because of the full facts found by the Commission, the premises of the argument are simply assumed; the fourth point is dependent upon the first three. Dealing with points 1 and 2 together; having to do with commercial warehousing services and with space rentals, below cost:

Appellants state they contend that the sole issue now before this Court as to their warehousing practices and leases is the sufficiency of the below-cost finding of the Commission. They claim that under the findings here no section 6 violation appears; that here the shippers must be found to have received something of value and that reasonable worth

measures value; that concessions may occur "(as measured by the prevailing market and other relevant facts)", and that here such prevailing market finding is absent—"That indispensable finding is wholly lacking". (See pp. 18, 19 of appellants' brief.) No section 6 violation may occur, they state, unless there is found the fact that the "concession" exceeds the value of what the shipper pays for it. (p. 26, *ibid*) They claim that no concession arises from mere dissipation of revenues (p. 28, *ibid*),—and presumably they mean under the facts found in this case.

Again, on page 32 of their brief, appellants, in the last line thereof, refer to the prevailing market; on page 33 they use the term "current market prices". Clearly they contend and mean that the Interstate Commerce Commission has made no finding concerning "prevailing market", or going rates, or rates for similar kind of service or rentals in the locality.

Appellants also infer or imply that the Commission's order was premised on a particular finding. (See Summary of Argument, p. 10, Appellant's Brief.) Our "Statement", hereinbefore, clearly disposes of that inference.

As to the contention of appellants about the market value or going rates, or the "prevailing market" for warehousing—storage, handling, insurance, and leasing of storage facilities, and the absence of any such finding in the reports of the Commission:

First, refer to the findings in this record at pages 97, 98, 105, 106, 107, 124, 125, 126, 138, 148, 348, 349, 350. Here, *inter alia*, the Commission found: That the *warehousing rates of appellants were lower than those of private warehousemen*; that obviously the latter could not long endure and sell their services *below cost*; that appellants' *motives* were effectuated regardless of what resulted; that while complaining of confiscation of their properties, the warehousemen (appellees) introduced testimony and exhibits *none of which was refuted* by appellants, showing they, *warehousemen, have lost business in practically every form*.

to appellants' commercial warehousing companies. The Commission, furthermore, found that the space rentals exacted by appellants for their storage facilities are not only below prevailing rates but are non-compensatory. (R. 197, 350)

The Commission, clearly, did make findings about prevailing charges and the market value of appellants' warehousing services, warehouse space and rentals. *It did much more. It found purpose to discriminate—to grab, to purchase—traffic.* This the appellants overlook in their entire argument. They refer to a "basic" finding only. *The Commission went on further: It found certain shippers unjustly preferred and others discriminated against unlawfully—in these activities included in this case. Even large groups of shippers were unjustly preferred. It found the prohibitions of the statute ignored—no due regard to expenditures—and these purposed to purchase traffic, where conflict of interest was to beat down, go below, the others' offer—a shippers' market resulting and the larger shippers benefiting—and the "viscious circle" and willful purpose of these appellants took the charges for warehousing services and such space rentals to below their costs!\** The purposes were clear, if only arrived at from the mere fact that these appellants undertook to and did construct and put on the market a 25 per cent increase in facilities, in a few years, when the then existing warehouses were not reasonably occupied.

So the Commission cannot be charged with no findings regarding going charges, existing rates—competitors' price for services or space—the prevailing market—for the many findings are self-speaking. Here a defying disregard of any market or prevailing charges, and a purposeful pay-

\* Some light is shed on these findings in the testimony of Mr. Tilly, President of the New York Dock Company, at page 1761 of the transcript of testimony: "We do object very violently, however, to the carriers taking merchandise at a mere fraction of their cost, absorbing the difference elsewhere from their services"


ment of losses suffered by cutting even way below costs to purchase traffic, is clearly pictured by the Commission's findings.

The findings of the Commission support fully its order. The specially-constituted Court found that, re each of the appellants here, the Commission had, on facts found as set forth by the Court, and on other findings as made in its reports, *supra*, arrived at its conclusions. (R. 378, 382, 386, 390, 393, 398, 401; 367, 368, 369; 373)

But what of sections 2 and 3 violations of the Act, as well found. Nothing is said thereupon by appellants. Certainly fractional cost charges of appellants can not be taken as "market," with the resulting "concessions" from line haul rates. Appellants do not consider the Commission's findings re section 15a. (R. 197, 198).

Appellants refer to the shipper getting something of value—citing *Wight v. U. S.*, *supra*, and contend this must be so found if there be violation. In that case the shipper received nothing of value. The carrier may have, for it obtained the traffic of that shipper. The consignee routed it over that carrier (the B. & O.) when it could have sent it, without the haulage service being necessary, over the Panhandle Line. It cost the B. & O. the full allowance (later made) to truck the beer from its line. The shipper received the B. & O. service at the same price as the Panhandle service. Actually there was nothing of value accorded him in this allowance.

The *American Tin Plate Case*, and the *New Haven Coal Case*, *supra*, have been hereinbefore analyzed. Assuredly appellants recognize that if the charges for their commercial warehousing services to shippers are below prevailing market—as found here—there is something of value given. Although here there is something of value given, that is not a requisite for a "concession." Just as in *Wight v. U. S.*, *supra*, nothing of value accrued to the shipper, so here the discriminations do not require, although they have, such buttress to support them. This takes us through appellants'

argument, void of the controlling law in the *Merchants Warehousing case*, *supra*, and the *New Haven Coal case*, *supra*, and others similarly cited hereinbefore. 

And in this connection appellants refer to the Commission's settled administration of the act (see page 31 of appellants' brief). They cite the case of *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683, and quote three paragraphs from which to infer that the prevailing market, existing rates and rentals, the reasonable value, should be the basis for a decision of the Commission, even under the facts in the instant case. They fail, however, to take into consideration the expressly stated position of the Commission in that case (p. 682), concerning leases resulting in some violation of the laws administered, which the Commission so expressly and in great detail has found in the instant case. In *Leases and Grants by Carriers to Shippers*, *supra*, at page 682, it is set forth that:

"Such violations may occur when the terms and conditions of the lease are so favorable to the lessee that it is clear that the real consideration for the lease must in part be found elsewhere, namely, in the freight which he ships over the lines of the lessor carrier."

In this case, *supra*, the situation at Spokane was illustrative of the practices investigated. While traffic considerations, as noted at page 679 of the Commission's report, were involved in the proceeding, it distinctly stated, at the bottom of page 681 that no shipper or receiver of freight at Spokane complained of the leases by the carrier—and, at the top of page 682—that none alleged undue prejudice or preference. In this connection the Commission pointed out in its conclusion, at the bottom of page 683, that shippers and others who believe that they are subjected to undue prejudice and disadvantage can be of assistance by bringing such situations to the Commission's attention. The proceeding was discontinued and no order was deemed necessary. The Commission explicitly set forth that it went

no further in its report in that case than to indicate some of the principles to be borne in mind by the carrier. There it did not have to deal with costs. Very low costs, if any—due to land-grants—were therein involved. Also, as it clearly appears, no shipper or receiver of freight even, complained of undue preference or prejudice. Purchasing traffic regardless of cost was clearly not a point for the Commission's consideration in this 1922 case. It is pointedly involved in the instant case.

The settled administrative practice of the Commission clearly is that when the practical effect is to reduce the transportation charge in the carriers' tariffs, quite a different situation exists, and particularly when violations of law which can be cured only by charging an amount equal to the costs involved, flagrantly occur. The situation and detailed facts in the case just cited readily are distinguished from those in the instant case, and in that case the Commission recognized certain circumstances may exist in other cases which amount to purchasing traffic, as here so definitely is done.

Appellants cite and quote from *Wharfage Charges at Atlantic and Gulf Ports*, 157 L. C. C. 663, 692, but their quotation, appearing at the bottom of page 31 of their brief, is merely a re quotation by the Commission in that case from the case just analyzed, *Leases and Grants by Carriers to Shippers, supra*, as also appears on page 691 of the *Wharfage Charges at Atlantic and Gulf Ports* case. Furthermore, on that same page 691, the Commission, *inter alia*, stated:

"That where it clearly appears that the traffic of the lessees is in part the consideration for the lease, the conclusion follows that the transaction amounts to a concession to the shipper-lessee, in violation of the Elkins Act and sections 2 and 6 of the interstate commerce act."

But regardless of all this, under the settled administrative practice of the Commission and the Courts, as exempli-

fied in the cases hereinbefore cited, it is obvious that even nothing of value need move to the shipper to establish discriminations flowing from a "concession" from the line-haul rate, particularly when facts found definitely and clearly, establish an "allowance" or "concession"—rebate—from the transportation tariffs of the carrier's charges, as so fully set forth in the concise and coherent findings and reports of the Interstate Commerce Commission in this case.

In the appellants' third point of argument they endeavor to arrive at a statement, merely by inference, that they are storing, etc., freight "in transit", an "in-transit service." Then they move over from calling this commercial warehousing of freight, so warehoused under the in-transit privilege of the carriers' tariffs, to a term which is a little more inclusive, differing from the so-called storage "in-transit service", as used on page 38 of their brief. This more inclusive term, on page 39 of their brief, is simply that the "intransit service" is a "transportation service". Then on page 40 they argue that they should not be required to get "cost" for this "in-transit service" because it is a "transportation service".

We shall not repeat here the many explicit and definite findings of the Commission with regard to what is commercial warehousing service performed by these carriers under their regulations and practices, and what is transportation service. This, as set forth *supra*, the Commission, in the proper exercise of its power, has definitely determined. We shall refer only to the Commission's third report and to section 6 of the Interstate Commerce Act.

In its third report (R. 271) the Commission condemns these practices of the carriers, appellants,

" \* \* \* not within their common-carrier obligations,  
 \* \* \* The tariffs now on file are instruments which  
 work violations of the act, in that \* \* \* (under the  
 guise of performing transportation services) \* \* \*  
 [appellants] violate sections 2, 3 and 6 of the act".

So when the Commission permitted, or required that the carriers file some kind of tariffs covering these commercial practices and charges, they simply concluded that because of their administrative practices of many years these commercial services should be set forth in tariffs and filed with them. By no means did they state that these commercial services were "transportation services"; they simply required the filing of them under the authority under section 6(1) of the Interstate Commerce Act, wherein the Commission has authority to require tariffs covering "all other charges" of a common carrier under its jurisdiction (*infra*, p. 65). The Commission must know certain things and can require any records or the filing of any charges by way of tariffs, or otherwise, that it needs in effectuation of its administrative obligations under the act. It is clear, therefore, that the premises of appellants under this third point in their brief are merely assumed. The Commission's findings that these are not transportation services suffice, particularly since the evidentiary background buttressing those findings is not even questioned.

Suppose, however, that appellants were correct and that these commercial warehousing services performed under the in-transit privilege were transportation services, appellants even then could not gainsay the findings of the Commission thereunto relating respecting discriminations arising from concessions,—less than cost provision of the services,—from the line-haul rates, discriminations in violation of sections 2 and 3 of the act. It is also respectfully submitted that appellants have completely disregarded the findings of this Commission (R. 197-198) that these allowances from the line haul rates through the appellants' storage practices—including handling and insurance—re this west-bound freight, etc., including also the space rentals in these storage practices, *dissipate* appellants' "funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest".

**CONCLUSION.**

The American Warehousemen's Association, Merchandise Division, Appellee, respectfully submits that the Interstate Commerce Commission has lawfully exercised its authority in this case and has only performed its duties in making the findings noted; and that the findings of the Interstate Commerce Commission, taken at their full and face value, are sufficient in law to support the Commission's order of February 2, 1937. Wherefore, it is respectfully submitted that the decree below should be affirmed, with costs upon appellants.

November, 1938.

Respectfully submitted,

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**APPENDIX.**

The following are the portions involved in this case of sections 1, 2, 3, 6, 15, and 15 (a) of the Interstate Commerce Act and section 1 of the Elkins Act.

Sec. 1 (3) [As amended February 28, 1930, June 19, 1934, and August 9, 1935.] [U. S. Code, Title 49.] The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotive, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Sec. 1. (4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facil-

ities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 1 (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Sec. 2 [As amended February 28, 1920, June 19, 1934, and August 9, 1935.] [U. C. Code, title 49, sec. 2.] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the

provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3 [As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935.] [U. S. Code, title 49, sec. 3.] (1). It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 6 [As amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920 and August 9, 1935.] [U. S. Code, title 49, sec. 6.] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common

carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Sec. 6. (2) Any common carrier subject to the provisions of this part receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this part, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Sec. 6. (3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance

with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

Sec. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the trans-

portation of passengers or property, except such as are specified in such tariffs.

Sec. 15 [As amended June 29, 1906; June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935.] [U. S. Code, title 49, sec. 15.] (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed; and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classifica-

tion and shall conform to and observe the regulation or practice so prescribed.

Sec. 15 (a) [Added February 28, 1920; amended June 16, 1933.] [U. S. Code, title 49, sec. 15a.] (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

Sec. 15(a) (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

Elkins Act, 49 U. S. C., sec. 41 (1):

"\* \* \* and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall be any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

